BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TIMOTHY PAINTER	)	
Claimant	)	
VS.	)	
	)	Docket No. 255,328
MCELHANEY FENCE BUILDERS	)	
Respondent	)	
AND	)	
	)	
CINCINNATI INSURANCE COMPANIES	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the July 9, 2002 Award and the July 25, 2002 Award Nunc Pro Tunc entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on February 4, 2003.

APPEARANCES

Kenneth J. Morton of Lawrence, Kansas, appeared for claimant. D'Ambra M. Howard of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award and Award Nunc Pro Tunc.

ISSUES

This is a claim for an April 17, 2000 accident, which the parties stipulated arose out of and in the course of claimant's employment with respondent. In the July 9, 2002 Award and the July 25, 2002 Award Nunc Pro Tunc, Judge Avery determined claimant had an 87.5 percent permanent partial general disability by averaging a 100 percent wage loss with a 75 percent task loss.

Respondent and its insurance carrier contend Judge Avery erred. They argue claimant quit an accommodated job provided by respondent after only two days of work

without providing respondent an opportunity to further modify the position. They also argue claimant has failed to make a good faith effort to find work with other employers as the positions that he was seeking were either unavailable or unrealistic in light of his work restrictions. Accordingly, respondent and its insurance carrier contend claimant's permanent partial general disability should be limited to his functional impairment rating.

In evaluating claimant's wage loss, respondent and its insurance carrier contend the Board should impute a post-injury wage that is at least 90 percent of claimant's pre-injury average weekly wage. Should the Board reach the issue of task loss, respondent and its insurance carrier request the Board to use the medical opinions of the doctor who treated claimant's foot and the task list provided by their vocational expert.

Conversely, claimant contends the award should be affirmed. Claimant argues he has a 75 percent task loss from both the foot and low back injuries. Claimant also contends the 100 percent wage loss is appropriate as he is unemployed despite his good faith attempts to return to work for respondent and to find other appropriate employment.

The only issue before the Board on this appeal is the nature and extent of claimant's injuries and disability.

FINDINGS OF FACT

After reviewing the entire record, the Board finds, as follows:

1. On April 17, 2000, claimant fell from a ladder while working on a shot-put cage at the University of Kansas. As a result of the fall, claimant fractured his left wrist, fractured his coccyx, and fractured his left heel. At the time of the accident, claimant was working for respondent, which is a family-owned fence company. On the date of accident, claimant was earning $12.75 per hour.

2. Immediately following the accident, claimant was taken to Lawrence Memorial Hospital for emergency medical treatment. A short time later, claimant was referred to Dr. Greg A. Horton at the Kansas University Medical Center for treatment of his left foot. Dr. Horton is a board-certified orthopedic surgeon and specializes in foot and ankle problems. On May 3, 2000, Dr. Horton reconstructed claimant's left heel, using plates and screws.

3. Following surgery, claimant began a long course of recovery and rehabilitation under the auspices of Dr. Horton. By September 2000, claimant had recovered sufficiently that he was able to participate in a work hardening program and Dr. Horton believed claimant was making great gains. But during rehabilitation, claimant began experiencing increased pain along the outside portion of his left

foot. Dr. Horton diagnosed inflammation of one of the peroneal tendons, which may have been caused by the hardware in claimant's foot.

4. Dr. Horton decreased the intensity of claimant's work hardening, immobilized the foot and injected the foot with cortisone. But claimant's foot symptoms did not resolve and in late October 2000 claimant was having increased irritation of the sural nerve in the left foot and he was also experiencing burning pain on the lateral aspect of the hindfoot. The doctor told claimant that the hardware could be contributing to claimant's symptoms and, therefore, they could consider removing the hardware. But after talking at length, claimant declined surgery as he wanted to try to get on with his life and return to work.

5. As claimant had declined the surgery to remove the hardware in his foot, Dr. Horton did not have any more treatment to offer. Accordingly, on October 23, 2000, the doctor released claimant from treatment with work restrictions and limitations. The doctor could not remember the exact restrictions he gave claimant in October 2000, but the doctor indicated the following restrictions, which were noted on an undated form signed by the doctor, were consistent with the restrictions that he gave claimant at that time:

> No ladder climbing over 3'. Limit uneven surfaces. No unprotected heights, roofs, or balancing. Limit carrying to 100-150 lbs.[1]

The doctor also noted in his October 23, 2000 office notes that claimant was not certain that he would be able to perform his regular job duties due to the required lifting and working on uneven ground.

6. Regarding claimant's attempts to return to work for respondent, the record is not entirely clear and in some places inconsistent. But according to the medical history taken by Dr. P. Brent Koprivica in March 2001, claimant returned to work for respondent in November 2000 and worked only one day. Moreover, Dr. Horton's testimony indicates that claimant returned to Dr. Horton around the first of December 2000 and shortly afterwards underwent additional foot surgery to remove the hardware and to address the sural nerve. Following this second surgery, the doctor returned claimant to therapy.

7. Dr. Horton saw claimant on a follow-up visit on March 8, 2001. At that time, claimant had completed therapy and was discharged to a home program. The doctor believed claimant had again reached maximum medical improvement.

[1] Horton Depo., Ex. 3.

Accordingly, the doctor released claimant with work restrictions. Dr. Horton's March 8, 2001 notes read, in part:

> I have told him [claimant] it would be reasonable to release him to work duties with restrictions. I think that he would be able to do some limited ladder climbing, but no unprotected heights. He can stand for 2 hours continuous with 15 minute breaks. I think I would restrict his lifting to 50 pounds maximum. . . .

8. Sometime after March 8, 2001, claimant again attempted to return to work for respondent. Claimant was not certain how many days he worked but he believes he worked two or three days. Claimant testified that he could not perform the work as he was in a lot of pain and that he was required to be on his feet for more than two hours and that he was lifting items that exceeded his weight restrictions. Also, according to Dr. Horton's office notes, during that attempt to return to work claimant stepped backwards onto a saw blade and heard his foot pop.

9. On March 19, 2001, claimant returned to Dr. Horton for further evaluation. The doctor determined claimant had not sustained a new injury and that his symptoms were back to their baseline level of pain. The doctor also noted that claimant was "back at work at his part time level" and that he could continue at his then current activity level. The Board notes that the evidentiary record does not provide any explanation as to what part-time work activity the doctor was referring.

10. On April 28, 2001, Dr. Horton issued his Final Rating Report in which the doctor rated claimant as having a 35 percent functional impairment to the foot and ankle under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.) (AMA *Guides*). Moreover, the doctor wrote that he did not anticipate that claimant would need any future surgery but that he would need to use a compression garment to control his swelling. The doctor noted in the April 28, 2001 report that claimant should be restricted, as follows:

> No unprotected heights. He may stand for 2 hours continuous with a 15 minute break there after *[sic]*. 50 pound lifting maximum.

The doctor, however, noted that those restrictions "may be reassessed, modified or lifted if his/her condition allows." At his deposition, the doctor explained that he did not check the box on the April 28, 2001 report that indicated claimant's restrictions were permanent because the doctor did not want to excessively restrict claimant as he appeared motivated to return to work.

11. When he was deposed, Dr. Horton further clarified the April 28, 2001 report and claimant's permanent work restrictions. The doctor explained that he did not believe claimant should work on scaffolding or above ground where he had to balance or where he would be at significant risk of falling. Therefore, the doctor did not believe claimant should work on roofs, balance on ladders without a harness, or walk on beams at a construction site. Although claimant could do some ladder climbing, Dr. Horton believed limiting the ladder climbing to three feet was reasonable. Moreover, due to the ongoing foot problems, the doctor believed claimant should probably use a special brace for walking on uneven surfaces.

12. Claimant did not work for respondent again after the March 2001 attempt to work. Claimant testified that he advised respondent that he could not do the work. Claimant also testified that respondent did not offer to provide him accommodated work. The Board finds that testimony credible as it is consistent with the testimony of respondent's owner, Jere McElhaney, who testified that he did not believe claimant had any restrictions when he returned to work as he had been released to work by the doctor. Although Mr. McElhaney's testimony is inconsistent (as was claimant's), he testified, in part:

> Q. (Mr. Morton) Did you testify [at an unemployment hearing] that you weren't aware Tim Painter had permanent restrictions and thought he had a full release [when he returned to work in March 2001]?
>
> A. (Mr. McElhaney) I was under the impression he was able to come back to work.
>
> Q. Without restrictions.
>
> A. I was going off what was given right here (indicating).
>
> . . . .
>
> A. I think what I can do is refer you to a document that I have where he (sic) was released to work.
>
> JUDGE AVERY: Your counsel will have the opportunity to redirect. His question is does this reflect your testimony? That's a yes or no question.
>
> THE WITNESS: I don't know. I would guess yes, I don't know.[2]

[2] R.H. Trans. at 105-106.

> . . . .
>
> A. No. We -- I always thought that the restrictions would have been ongoing until we had a full release.
>
> Q. (Judge Avery) But again, I thought it was your testimony at the unemployment hearing that he had been released to go back to work?
>
> A. That's -- that's -- that's what -- when Tim came to work for us he said he had been released and was able to go back to work.
>
> Q. Okay. With no restrictions.
>
> A. That's what he had stated.[3]

And when Mr. McElhaney was asked whether respondent had ever offered claimant an accommodated job, Mr. McElhaney did not directly answer the question.

> Q. (Mr. Morton) Is it your testimony that you offered Tim Painter employment? And I'm talking about when he came back to work after the injury, that you offered him employment and that did not involve lifting more than 50 pounds, did not involve standing continuously for more than two hours and did not involve unprotected heights?
>
> A. (Mr. McElhaney) Did we offer him that job?
>
> Q. Yes. Is that your testimony, that you offered him employment that did not involve any of those three restrictions?
>
> A. Mr. Painter came back and said he wanted to go to work for us under the following condition. We said fine, no problem.[4]

The Board finds that although Mr. McElhaney testified that respondent was willing to accommodate claimant's restrictions, the record does not establish that respondent ever made such an offer. The Board further finds that Mr. McElhaney did not believe that claimant was under any restrictions when he last attempted to return to work for respondent in March 2001.

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[3] *Id.* at 115-116.

[4] *Id.* at 119.

13. In April 2001 and again in May 2001, claimant tried to work at his in-laws' bait shop. But according to claimant's mother-in-law, Sandra Smith, on both occasions claimant's foot began swelling and throbbing, preventing him from working. Moreover, Ms. Smith indicated the job violated claimant's work restrictions as it required lifting over 50 pounds and required continuous standing for more than two hours at a time. Claimant's father-in-law, Eddie Smith, corroborated his wife's testimony that claimant attempted to work at the bait shop but was physically unable to do the work.

14. When claimant testified in April 2002 at the regular hearing, he was unemployed despite his contention that he had been looking for work for more than a year. According to claimant, for more than a year he made between two and four job applications per week in addition to making telephone calls to potential employers who advertised in newspapers. But when asked for details, claimant could not remember where he had made job applications and could name only a few potential employers where he had allegedly applied. At the regular hearing, claimant also testified that he had applied for vocational rehabilitation training from the State of Kansas, which was to begin in May 2002. Claimant is not certain whether he has completed a GED program, but his vocational rehabilitation plan is to take computer classes.

15. At his deposition, Dr. Horton reviewed a list of former work tasks prepared by vocational consultant Mary Titterington. The doctor indicated that claimant had lost the ability to perform seven of the 24 total tasks, but the doctor indicated there were another nine tasks that claimant may or may not be able to perform depending upon whether claimant was allowed to take breaks from constantly standing and walking, which those tasks were described as requiring. Consequently, according to Dr. Horton's testimony, claimant has anywhere from a 29 percent to a 67 percent loss of former work tasks due to his foot.

16. Dr. Horton testified that he does not have an opinion whether claimant has a back problem related to his foot. On the other hand, Dr. Eden Wheeler, who is board-certified in physical medicine and rehabilitation and who evaluated claimant in August 2001 at respondent and its insurance carrier's request, rated claimant as having a five percent whole person functional impairment under the AMA *Guides* (4th ed.) due to low back pain, which the doctor believed was caused by a mild gait change that arose after claimant's foot injury and surgery. The doctor also recommended that claimant be further evaluated for possible carpal tunnel syndrome due to the numbness that he was having in his left hand. Dr. Wheeler agreed with the restrictions that Dr. Horton had placed on claimant and testified that those restrictions would also be appropriate for claimant's low back injury. Dr. Wheeler was not asked to rate claimant's foot and ankle injuries.

17. In attempting to establish the extent of his injury and disability, claimant presented the testimony of Dr. P. Brent Koprivica, who is board-certified in both emergency and occupational medicine. Dr. Koprivica saw claimant in March 2001 and determined that as a result of the April 2000 accident claimant sustained a cervical strain that had resolved, a non-displaced sacral fracture, a chronic lumbosacral strain, a non-displaced left wrist fracture, and a severe calcaneal fracture to the left foot. Utilizing the AMA *Guides* (4th ed.), the doctor rated claimant as having a 23 percent whole person functional impairment, which represented a 10 percent functional impairment to the left upper extremity for the wrist fracture, a five percent whole person functional impairment for the sacral fracture and chronic low back pain, and a 50 percent functional impairment to the left foot for the calcaneal fracture and subtalar involvement, loss of Bohler's angle, chronic peroneal tendinitis associated with calcaneal widening, loss of hindfoot and subtalar joint motion, and the sural neurectomy.

18. Due to the nature and severity of claimant's injuries, Dr. Koprivica did not believe that claimant should perform the fence and construction work that he has done in the past. Moreover, the doctor believes claimant's condition will worsen with time. According to the doctor, claimant should avoid uneven surfaces and be restricted to ground level work, restricted from standing and walking more than two hours at a time, and restricted from squatting, crawling and kneeling. In short, the doctor believes claimant should, at most, perform work in the medium physical category.

19. Dr. Koprivica reviewed a list of claimant's former work tasks prepared by vocational consultant Michael J. Dreiling. The doctor testified that as a result of the April 2000 accident claimant had lost the ability to perform 12 of 16, or 75 percent, of the tasks that he had performed in the 15-year period before the accident.

20. Contrary to Dr. Horton, Dr. Koprivica believes claimant will need future prescriptions and surgery for the post-traumatic arthritis that was present in claimant's left foot and, perhaps, for the peroneal tendinitis that he was experiencing due to the widening of the heel.

21. In December 2000, at his attorney's request claimant met with vocational consultant Michael J. Dreiling. Based upon their meeting, Mr. Dreiling determined claimant had performed 16 job tasks in the 15-year period before claimant's April 2000 accident. In December 2000, Mr. Dreiling did not attempt to evaluate claimant's ability to earn wages as he was receiving medical treatment and had not been released from medical care. Moreover, at his May 2002 deposition Mr. Dreiling did not provide an opinion regarding claimant's post-injury ability to earn wages as he was not asked.

22. In March 2002, vocational consultant Mary Titterington met with claimant at respondent and its insurance carrier's request. At their visit, claimant told Ms. Titterington that he was not looking for work as he had contacted the State of Kansas and was hoping to go to school and obtain training in computer science. Ms. Titterington also noted claimant had applied for Social Security Disability and had been denied, but that he was applying again.

23. During their meeting, claimant was unable to give Ms. Titterington much detail as to his prior job search activities. Ms. Titterington determined claimant's restrictions from Dr. Horton generally restricted him from performing some of the medium, the heavy and very heavy categories of labor, leaving him with the ability to perform sedentary, light, and some of the medium labor categories. Moreover, in her March 18, 2002 Job Task Analysis Report, Ms. Titterington classified claimant's job with respondent as heavy physical labor.

24. Based on their interview, Ms. Titterington determined claimant had performed 24 job tasks in the 15-year period before his April 2000 accident. In her report, Ms. Titterington noted specific occupations which she believed claimant could perform despite Dr. Horton's work restrictions and which paid from $8.78 to $13.15 per hour. Ms. Titterington further noted in her report that claimant retained the ability to earn an average wage of $10.71 to $10.95 per hour, which creates a 14 to 16 percent wage loss when considering claimant's pre-injury hourly wage of $12.75 per hour. Page eight of the March 18, 2002 Job Task Analysis Report reads, in part:

> The average wage of the six occupations cited above in Kansas City Wages is $10.95 an hour. When Kansas wages are considered the average wage is $10.71. An agreed upon average wage was not available to this consultant. Mr. Painter indicated his salary was usually $12.75 an hour except on union projects. If the $12.75 wage is used, this results in a 15% *[sic]* loss of wages when the Kansas City average wage is used. When the Kansas average wage is used, there is a 16% loss of wages.

The only evidence in the record addressing claimant's post-injury ability to earn wages is from Ms. Titterington.

CONCLUSIONS OF LAW

The Board concludes the July 9, 2002 Award and the July 25, 2002 Award Nunc Pro Tunc should be modified to reduce claimant's permanent partial general disability from 87.5 percent to 38 percent.

This claim has been rendered difficult as neither claimant nor respondent's owner are particularly credible. The record reflects that claimant provided different information to different people at different times regarding such facts as prior injuries, level of education, and when certain events occurred. Moreover, when asked about specifics regarding his post-injury job search, claimant was unable to provide any detailed information. On the other hand, respondent's owner has been inconsistent in his representation of the facts regarding whether he had provided accommodated employment to claimant or whether he offered any accommodated work to claimant following claimant's March 2001 release to return to work. Accordingly, the Board is unable to find either claimant or respondent's owner more credible than the other.

On the other hand, the medical evidence is overwhelming that claimant sustained permanent injury to both his left foot and low back. Dr. Koprivica is the only physician who rated both the foot and low back injuries. Accordingly, the Board adopts Dr. Koprivica's opinion that claimant has sustained a 23 percent whole person functional impairment rating as its own finding.

Because claimant has sustained an injury that is not listed in the "scheduled injury" statute, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[5] and *Copeland*.[6] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute)

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[5] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[6] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[7]

As the Kansas Court of Appeals recently held in *Watson*,[8] the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker fails to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based on all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[9]

The Board concludes that respondent did not offer claimant work that he could perform within his work restrictions and limitations. On the other hand, claimant has failed to prove that he has made a good faith effort to find other work within his restrictions and limitations. Accordingly, the Board must impute a post-injury wage for purposes of the permanent partial general disability formula. The Board questions claimant's ability to perform some of the occupations listed by Ms. Titterington and suspects that Ms. Titterington may be overestimating claimant's post-injury ability to earn wages. Therefore, the Board finds that claimant's post-injury ability to earn wages lies towards the lower end of Ms. Titterington's estimates. Accordingly, the Board finds that claimant retains the ability to earn approximately $8.78 per hour, which equals $351.20 per week. Comparing $351.20 per week with claimant's stipulated pre-injury average weekly wage of $464.37 yields a 24 percent wage loss.

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[7] *Id.* at 320.

[8] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[9] *Id.* at Syl. ¶ 4.

The Board also concludes claimant has sustained a 52 percent task loss. As stated above, Dr. Horton indicated that claimant sustained at least a 29 percent task loss based on the restrictions for the foot. Moreover, Dr. Wheeler indicated that the restrictions that Dr. Horton provided for the foot would also be appropriate for the back. On the other hand, Dr. Koprivica indicated that claimant sustained a 75 percent task loss due to his foot and back injuries. The Board concludes that claimant's task loss lies somewhere between those 29 percent and 75 percent ratings. Averaging those task loss percentages yields 52 percent, which the Board finds as the percentage of work tasks that claimant performed in the 15-year period before his April 17, 2000 accident that he is no longer able to perform.

Averaging claimant's 24 percent wage loss with his 52 percent task loss yields a 38 percent work disability for which claimant should receive permanent partial general disability benefits. Accordingly, the July 9, 2002 Award and the July 25, 2002 Award Nunc Pro Tunc should be modified.

The Board adopts the findings and conclusions set forth by the Judge that are not inconsistent with the above.

AWARD

WHEREFORE, the Board modifies the July 9, 2002 Award and the July 25, 2002 Award Nunc Pro Tunc and reduces the permanent partial general disability from 87.5 percent to 38 percent.

Timothy Painter is granted compensation from McElhaney Fence Builders and its insurance carrier for an April 17, 2000 accident and resulting disability. Based upon an average weekly wage of $464.37, Mr. Painter is entitled to receive 48 weeks of temporary total disability benefits at $309.60 per week, or $14,860.80, plus 145.16 weeks of permanent partial general disability benefits at $309.60 per week, or $44,941.54, for a 38 percent permanent partial general disability, making a total award of $59,802.34.

As of February 28, 2003, there is due and owing to Mr. Painter 48 weeks of temporary total disability compensation at $309.60 per week in the sum of $14,860.80, plus 101.57 weeks of permanent partial general disability compensation at $309.60 per week in the sum of $31,446.07, for a total due and owing of $46,306.87, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $13,495.47 shall be paid at $309.60 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award and Award Nunc Pro Tunc that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of March 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kenneth J. Morton, Attorney for Claimant
D'Ambra M. Howard, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Director, Division of Workers Compensation